

Statement on the Supreme Court Confirmation Process

Senate Democratic Steering and Outreach Committee Ad Hoc Forum on the Supreme Court Vacancy

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In a recent piece in the *Washington Post*, Miguel Estrada and Benjamin Wittes proclaimed that the only rule that now governs the confirmation process for Supreme Court justices “is the law of the jungle: There are no rules.”¹

This is a profoundly misleading – and dangerous – statement. If taken seriously and acted upon, this misconception would undermine 225 years of well-settled tradition and throw the Supreme Court confirmation process into a state of partisan chaos that would damage both the rule of law and the Supreme Court as an institution.

In fact, when we take a deep breath and actually examine the performance of the Senate over time, it is clear that the Senate defers to the president in these matters as long as the president puts forth nominees who are clearly qualified for the position and who are reasonably moderate in their views. Indeed, this has been the outcome in every single nomination in the last sixty years and, as far as I can discern, in every nomination in American history.

Moreover, this is true even when the senators disagree with a nominee’s judicial philosophy, even when the Senate is controlled by the opposing party, even when the nominee’s confirmation is likely to have a significant impact on the balance on the Court, and even if the final year of a president’s term. When all is said and done, nominees who are both qualified and moderate are confirmed. Period.

The “no rules/law of the jungle” assertion is premised primarily on the fact that since the Supreme Court’s 2000 decision in *Bush v. Gore*, members of the Senate have tended to vote in a more partisan manner than in the past. This is true. In the Roberts, Alito, Sotomayor, and Kagan confirmations, members of the opposing party cast only 26% of their votes to confirm, whereas in the five

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¹ Miguel Estrada & Benjamin Wittes, “There Are No Longer Any Rules in the Supreme Court Confirmation Process,” *Washington Post* (Feb. 19, 2016).

preceding Supreme Court nominations senators from the opposing party cast 73% of their votes to confirm.²

This is, indeed, a troubling trend. It is due largely to the much greater involvement of interest groups in the confirmation process, a phenomenon that raises the political stakes for members of the Senate and gives them an incentive to vote in a more partisan manner.

But it is important not to blow this out of proportion. In fact, in the years since 2000 every one of those four nominees was confirmed by the Senate, and they were confirmed with appreciable bipartisan support.

What, though, are the “rules” – or traditions – that govern the Supreme Court confirmation process?

At the outset, it is worth noting that from 1790 to the present, the Senate has confirmed 91% of the 129 Supreme Court nominees it has considered. In the last sixty years, the Senate has confirmed 89% of the 28 Supreme Court nominees it has considered. Thus, despite all of the overwrought handwringing about a process without rules, there has been no change over time.

Of course, not every member of the Senate votes to confirm every nominee. Why do senators sometimes vote against confirmation?

One factor, of course, is partisanship. Senators are more likely to vote to confirm nominations made by a president of their own party than nominations made by a president of the opposing party.³ But it is important to note that in the last sixty years the Senate has voted to confirm 80% of all Supreme Court nominees (12 of 15) *even when the opposing party controlled the Senate*.

In addition to partisanship, senators also take a nominee’s qualifications into account. In the last sixty years, nominees who were perceived as highly qualified, such as Lewis Powell, Antonin Scalia, and Ruth Bader Ginsburg, received an average of 97% of the votes, whereas nominees perceived as less qualified, such as Byron White, Clarence Thomas, and David Souter, received an average of 61% of the votes.

Senators also take a nominee’s judicial philosophy into account. In the last sixty years, nominees perceived as having moderate views, such as John Paul

² All of the data cited in this Statement are derived from Geoffrey R. Stone, “Understanding Supreme Court Confirmations,” 2010 *Supreme Court Review* 381, which is available at http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1786&context=journal_articles

³ In the twenty most recent confirmation votes, for example, members of the Senate voted 96% of the time to confirm nominations made by a president of their own party, and 58% of the time to confirm nominations made by a president of the opposing party.

Stevens, Sandra Day O'Connor, and Stephen Breyer, received an average of 96% of the votes, whereas nominees perceived as having more strongly ideological views, whether on the right or on the left, such as Thurgood Marshall, William Rehnquist, and Robert Bork, received an average of 77% of the votes.

Another factor that influences senators is the perceived impact an appointment might have on the distribution of views on the Court. In the last sixty years, those nominees whose confirmations were perceived as likely to have the least impact, such as John Roberts, Anthony Kennedy, and Elena Kagan, received an average of 96% affirmative votes, whereas the nominees seen as likely to have the greatest impact, such as Clarence Thomas, Harry Blackmun, and Thurgood Marshall, received 71% of the votes.

What does all this tell us? First and foremost, in the last sixty years 19 of the 20 most moderate Supreme Court nominees have been confirmed by the Senate. This includes everyone from Sonia Sotomayor to Warren Burger to Samuel Alito. The only exception was Clement Haynsworth, who was defeated because of allegations of financial impropriety.

Even more impressive, *even when the Senate was controlled by the opposing party*, in the last sixty years every one of the eight nominees who was perceived to be both qualified and reasonably moderate was easily confirmed. This includes Charles Whittaker, Potter Stewart, Warren Burger, Harry Blackmun, Lewis Powell, John Paul Stevens, Anthony Kennedy, and David Souter. It is noteworthy, by the way, that every one of these eight justices was nominated by a Republican president and confirmed by a Senate controlled by the Democratic Party.

Thus, despite all the fuss and fury over the Supreme Court confirmation process, the plain and simple fact is that the Senate always defers to the president as long as the president puts forth nominees who are clearly qualified and who are reasonably moderate in their views. And this is true even when the Senate is controlled by the opposing party. In short, nominees who are both qualified and moderate are confirmed. Period.

This approach has major benefits to the nation. It reduces potential fractiousness within the Senate, it minimizes the risk of confirmation stalemate, it reduces the risk of politicizing the judiciary, and it more or less averages out over time. In short, this is a sensible, pragmatic approach that has served the nation well.

Republicans who now declare that the traditional confirmation process is unfair because President Obama might appoint a justice they don't like need to slow down and consider the long-run.

From 1968 to 1992, Republicans controlled the White House for 20 of 24 years. During that time, Republican presidents made eleven consecutive appointments to the Supreme Court. From 1992 to 2016, Democrats controlled the White House for 16 of 24 years. During that time, Democrats will have made 5 of 7 appointments to the Supreme Court, including the successor to Justice Scalia. Over that 48 year period, the Republicans have controlled the White House 58% of the time, but they have made 72% of the Supreme Court appointments. They have nothing to complain about.

Although the Republicans' desire to obstruct is understandable as a matter of partisan self-interest, such obstruction would set a disastrous precedent for the future. Instead, if the president nominates a clearly qualified and relatively moderate nominee, Senate Republicans should just do their job, as members of the Senate have done it throughout our history, and confirm that nominee. Sometimes one's oath of office -- to preserve and protect the Constitution -- requires one to do the right thing.